ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 353. MEDICAID MANAGED CARE
SUBCHAPTER G. STAR+PLUS

1 TAC §353.608

The Texas Health and Human Services Commission (HHSC) adopts amendments to Title 1, Part 15, Chapter 353, Subchapter G, §353.608, concerning Minimum Payment Amounts to Qualified Nursing Facilities with changes to the proposed text as published in the March 31, 2017, issue of the *Texas Register* (42 TexReg 1697).

BACKGROUND AND JUSTIFICATION

During the 84th Session, the Texas Legislature, through the 2016-17 General Appropriations Act (Article II, House Bill 1, 84th Legislature, Regular Session, 2015, Rider 97), directed HHSC to transition the Nursing Facility Minimum Payment Amounts Program (MPAP) from a program solely based on enhanced payment rates to publicly owned nursing facilities to a Quality Incentive Payment Program (QIPP) for all nursing facilities that have a source of public funding for the non-federal share. The additional payments to nursing facilities through the QIPP are to be based on improvements in quality and innovation in the provision of nursing facility services.

Section 353.1303, concerning Quality Incentive Payment Program for Nursing Facilities, describes the QIPP.

Initially, HHSC intended to implement QIPP effective March 1, 2017, with the MPAP program ending February 28, 2017. HHSC was unable to secure an agreement with the Centers for Medicare & Medicaid Services (CMS) for a March 1 implementation. As a result, QIPP implementation was delayed to September 1, 2017. Simultaneously, a dispute with CMS as to the allowability of MPAP led HHSC to suspend MPAP effective August 31, 2016.

The amendment to §353.608 allows a final MPAP eligibility period for existing MPAP participants prior to the shift to QIPP. This final eligibility period will allow qualified nursing facilities to receive MPAP payments for dates of service from April 1, 2017, until August 31, 2017. Facilities not previously enrolled in MPAP will not be eligible for these MPAP payments.

The amendment also corrects an error in the calculation of the adjustment to the minimum payment amount described in subparagraph (d)(2)(F) of the rule.

In addition, the amendment:

deletes references to Intergovernmental Transfer (IGT) Responsibility agreements, instead requiring the non-state governmental entity that owns the nursing facility to submit its estimated MPAP IGT for the entire eligibility period no later than a date determined by HHSC;

updates language regarding timing of IGT responsibility determination to indicate that HHSC will determine IGT responsibilities prior to finalizing the managed care capitation rates that include the increase in payments to the MCOs due to MPAP for the eligibility period in question;

updates the time period during which HHSC may complete interim IGT reconciliations for eligibility period three to August 31, 2017, through August 31, 2019;

deletes language indicating that nursing facilities owned by non-state governmental entities that fail to timely complete their IGTs as described in the rule are ineligible to participate in the MPAP for future eligibility periods; and

updates the end date for the MPAP from February 28, 2017, to August 31, 2017.

In addition, HHSC is amending §353.608(b)(9) for adoption to clarify that, "Centers for Medicare & Medicaid Services (CMS) approval is required for any payments to be made under this section for Eligibility Period Three."

COMMENTS

The 30-day comment period ended May 1, 2017.

During this period, HHSC did not receive any comments regarding the proposed rule(s).

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and Texas Human Resources Code, §32.021 and Texas Government Code, §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§353.608. Minimum Payment Amounts to Qualified Nursing Facilities.

(a) Introduction. This section establishes minimum payment amounts for certain non-state government-owned nursing facility providers participating in the STAR+PLUS Program, or other Medicaid managed care programs offering nursing facility services, and the conditions for receipt of these amounts.

(b) Definitions.

(1) Calculation Period--A month used to calculate the Minimum Payment Amount. There are six calculation periods in Eligibility Period One, twelve calculation periods in Eligibility Period Two, nine

calculation periods in Eligibility Period Two-A, and five calculation periods in Eligibility Period Three.

(2) CHOW Application--An application filed with the Department of Aging and Disability Services for a nursing facility change of ownership.

(3) Clean Claim--A claim submitted by a provider for health care services rendered to an enrollee with the data necessary for the managed care organization to adjudicate and accurately report the claim. Claims for Nursing Facility Unit Rate services that meet the Department of Aging and Disability Services' criteria for clean claims submission are considered Clean Claims. Additional information regarding Department of Aging and Disability Services' criteria for clean claims submission is included in HHSC's Uniform Managed Care Manual, which is available on HHSC's website.

(4) DADS--The Texas Department of Aging and Disability Services, or its successor agency.

(5) Eligibility Period--A period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section.

(6) Eligibility Period One--The first period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section, covering dates of service from the later of March 1, 2015, or the date on which nursing facility services become managed care services, to August 31, 2015.

(7) Eligibility Period Two--The second period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section, covering dates of service from September 1, 2015, to August 31, 2016.

(8) Eligibility Period Two-A--The third period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section, covering dates of service from December 1, 2015, to August 31, 2016.

(9) Eligibility Period Three--The fourth period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section, covering dates of service from April 1, 2017, to August 31, 2017. Centers for Medicare & Medicaid Services (CMS) approval is required for any payments to be made under this section for Eligibility Period Three.

(10) First Payment--The payment made in the ordinary course of business by MCOs to Qualified Nursing Facilities for the provision of covered services to Medicaid recipients.

(11) HHSC--The Texas Health and Human Services Commission or its designee.

(12) Intergovernmental transfer (IGT)--A transfer of public funds from a non-state governmental entity to HHSC.

(13) IGT Responsibility--The IGT owed by a non-state governmental entity, as determined by HHSC, for funding the non-federal share of the increase in the payments to the MCOs due to the Minimum Payment Amount program.

(14) MCO--A Medicaid managed care organization contracted with HHSC to provide nursing facility services to Medicaid recipients.

(15) Minimum Payment Amount--The minimum payment amount for a Qualified Nursing Facility, as calculated under subsection (d) of this section.

(16) Network Nursing Facility--A nursing facility that has a contract with an MCO for the delivery of Medicaid covered benefits to the MCO's enrollees.

(17) Non-state Governmental Entity--A hospital authority, hospital district, health district, city or county.

(18) Non-state Government-owned Nursing Facility--A network nursing facility where a non-state governmental entity holds the license and is a party to the nursing facility's Medicaid provider enrollment agreement with the state.

(19) Nursing Facility Add-on Services--The types of services that are provided in the nursing facility setting by a provider, but are not included in the Nursing Facility Unit Rate, including but not limited to emergency dental services, physician-ordered rehabilitative services, customized power wheel chairs, and augmentative communication devices.

(20) Nursing Facility Unit Rate--The types of services included in the DADS daily rate for nursing facility providers, such as room and board, medical supplies and equipment, personal needs items, social services, and over-the-counter drugs. The Nursing Facility Unit Rate also includes applicable nursing facility rate enhancements as described in §355.308 of this title (relating to Direct Care Staff Rate Component), and professional and general liability insurance. Nursing Facility Unit Rates exclude Nursing Facility Add-on Services.

(21) Qualified Nursing Facility--A Non-state Government-Owned Network Nursing Facility that meets the eligibility requirements described in subsection (e) of this section.

(22) Public Funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a non-state governmental entity that holds the license and is party to the Medicaid provider enrollment agreement with the state. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(23) Regional Healthcare Partnership (RHP)--A collaboration of interested participants that work collectively to develop and submit to the state a regional plan for health care delivery system reform as defined and established under Chapter 354, Subchapter D of this title (relating to Texas Healthcare Transformation and Quality Improvement Program).

(24) RUG--For the purpose of calculations described in subsection (d)(1) of this section, a resource utilization group under Medicare Part A as established by the Centers for Medicare & Medicaid Services (CMS). For the purpose of calculations described in subsection (d)(2) of this section, a resource utilization group under the RUG-III 34 group classification system, Version 5.20, index maximizing, as established by the state and CMS.

(25) Second Payment--The amount a Qualified Nursing Facility can receive that is equal to the Minimum Payment Amount less adjustments to that amount, as described in subsection (d) of this section.

(c) Payment of Minimum Payment Amount to Qualified Nursing Facilities.

(1) An MCO must pay a Qualified Nursing Facility at or above the Minimum Payment Amount in two installment payments for a Calculation Period, using the calculation methodology described in subsection (d) of this section.

(A) The MCO must make the First Payment no later than ten calendar days after a Qualified Nursing Facility or its agent submits a Clean Claim for a Nursing Facility Unit Rate to the HHSC-designated portal or the MCO's portal, whichever occurs first. The MCO will make the First Payment for the Nursing Facility Unit Rate at or above the prevailing rate established by HHSC for the date of service. HHSC's website includes information concerning HHSC's prevailing rates. The MCO must make the Second Payment no later than 10 calendar days after being notified of the Second Payment amount by HHSC. The Second Payment will be the difference between the Minimum Payment Amount and the adjustment to the Minimum Payment Amount, as calculated by HHSC and described in subsection (d) of this section.

(B) For purposes of illustration only, if a Qualified Nursing Facility provider files a Clean Claim for a Nursing Facility Unit Rate on March 6, 2015, the MCO must make the First Payment no later than March 16, 2015, and the Second Payment no later than 10 calendar days after being notified of the Second Payment amount by HHSC.

(2) HHSC will provide each MCO with a list of its Qualified Nursing Facilities for each Calculation Period as well as the Second Payment amount, as calculated by HHSC and described in subsection (d) of this section, associated with the MCO's members for each of its Qualified Nursing Facilities.

(d) Calculation of the Second Payment. HHSC will calculate the Second Payment for each Qualified Nursing Facility using the methodology detailed in this subsection. If a Qualified Nursing Facility is contracted with more than one MCO, HHSC will calculate a separate Second Payment for each MCO with which the Qualified Nursing Facility is contracted.

(1) Calculate the Minimum Payment Amount. The Minimum Payment Amount is made up of multiple subsidiary amounts. There is a subsidiary amount for each RUG.

(A) To determine the subsidiary amount for a particular RUG, use the formula: Subsidiary Amount = Days of Service x Medicare Rate, where:

(i) "Days of Service" is the total Medicaid days of service for a particular RUG for clean claims for services that were provided during the Calculation Period; and

(ii) "Medicare Rate" is the Medicare skilled nursing facility payment rate for the RUG in effect on the date of service.

(B) The Minimum Payment Amount is equal to the sum of all subsidiary amounts calculated in accordance with subparagraph (A) of this paragraph.

(2) Calculate the Adjustment to the Minimum Payment Amount. The adjustment to the Minimum Payment Amount is equal to the sum of all adjustments for each RUG. The adjustment to the Minimum Payment Amount is determined as follows:

(A) First, determine the amount of the First Payment to the nursing facility using the formula: First Payment = Days of Service x MCO Rate, where:

(i) "Days of Service" is the total Medicaid days of service for a particular RUG for clean claims for services that were provided during the Calculation Period; and

(ii) "MCO Rate" is the rate paid by the MCO for the particular RUG.

(B) Second, sum the result in subparagraph (A) of this paragraph for each RUG.

(C) Third, add or subtract, as necessary, the amount of payment adjustments to Nursing Facility Unit Rate claims for services that were provided during the Calculation Period from the result in subparagraph (B) of this paragraph.

(D) Fourth, determine the amount related to the Nursing Facility Add-on Services using the formula: Nursing Facility Add-on Amount = Days of Service x Per Diem, where:

(i) "Days of Service" equals the number used in subparagraph (A)(i) of this paragraph; and

(ii) "Per Diem" is an estimate, as determined by HHSC, of the weighted average per diem payment amount for Nursing Facility Add-on Services provided to Medicaid recipients in Qualified Nursing Facilities.

(I) For Eligibility Period One, the per diem will equal $3.48.

(II) For Eligibility Period Two, the per diem will equal $3.48 plus medical inflation between the mid-point of Eligibility Period One and the mid-point of Eligibility Period Two, as determined by HHSC.

(III) For Eligibility Period Two-A, the per diem will equal $3.48 plus medical inflation between the mid-point of Eligibility Period One and the mid-point of Eligibility Period Two-A, as determined by HHSC.

(IV) For Eligibility Period Three, the per diem will equal $3.48 plus medical inflation between the mid-point of Eligibility Period One and the mid-point of Eligibility Period Three, as determined by HHSC.

(E) Fifth, sum the result in subparagraph (D) of this paragraph for each RUG.

(F) Sixth, determine the adjustment to the Minimum Payment Amount by adding the result from subparagraph (E) of this paragraph from the result from subparagraph (C) of this paragraph.

(3) Calculate the Second Payment. To determine the Second Payment, subtract the adjustment to the Minimum Payment Amount described in paragraph (2)(F) of this subsection from the Minimum Payment Amount described in paragraph (1) of this subsection.

(e) Eligibility for Receipt of Minimum Payment Amounts.

(1) A nursing facility is eligible to receive the Minimum Payment Amounts described in this section if it complies with the requirements described in this subsection for each Eligibility Period.

(2) Eligibility Period One. A nursing facility is eligible to receive Minimum Payment Amounts for Eligibility Period One if it meets the following requirements:

(A) The nursing facility must be a Non-state Government-owned Nursing Facility with a Medicaid contract effective date of October 1, 2014, or earlier. HHSC will finalize its list of eligible facilities on November 1, 2014. A facility may only be eligible if its contract is assigned by DADS to a non-state government entity by October 31, 2014, with an effective date of October 1, 2014, or earlier.

(B) The Non-state Governmental Entity that owns the nursing facility must have entered into an IGT Responsibility agreement with HHSC by November 3, 2014. The IGT Responsibility agreement will cover the estimated IGT Responsibility for the nursing facility for the Eligibility Period.

(C) The Non-state Governmental Entity that owns the nursing facility must certify the following facts on a form prescribed

by HHSC and the form must be received by HHSC by November 3, 2014.

(i) That it is a Non-state Government-owned Nursing Facility where a Non-state Governmental Entity holds the license and is party to the facility's Medicaid contract.

(ii) That all funds transferred to HHSC via IGT for use as the state share of payments are Public Funds.

(iii) That no part of any payment made under the Minimum Payment Amount program under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds.

(3) Eligibility Period Two. A nursing facility is eligible to receive the Minimum Payment Amounts for Eligibility Period Two if it has met the following requirements:

(A) The nursing facility must be a Non-state Government-owned Nursing Facility with a Medicaid contract effective date of March 1, 2015, or earlier. HHSC will finalize its list of eligible facilities on March 1, 2015. A facility may only be eligible if its contract is assigned by DADS to a non-state government entity by February 28, 2015, with an effective date of March 1, 2015, or earlier.

(B) The Non-state Governmental Entity that owns the nursing facility must have entered into an IGT Responsibility agreement with HHSC by February 28, 2015. The IGT Responsibility agreement will cover the estimated IGT Responsibility for the nursing facility for the Eligibility Period.

(C) The Non-state Governmental Entity that owns the nursing facility must certify the following facts on a form prescribed by HHSC and the form must be received by HHSC by February 28, 2014.

(i) That it is a Non-state Government-owned Nursing Facility where a Non-state Governmental Entity holds the license and is party to the facility's Medicaid contract.

(ii) That all funds transferred to HHSC via IGT for use as the state share of payments are Public Funds.

(iii) That no part of any payment made under the Minimum Payment Amount program under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds.

(D) The Non-state Governmental Entity that owns the nursing facility must submit to HHSC, upon demand, copies of any contracts it has with third parties that reference the administration of, or payments from, the Minimum Payment Amount program.

(4) Eligibility Period Two-A. A nursing facility is eligible to receive the Minimum Payment Amounts for Eligibility Period Two-A if it has met the following requirements:

(A) The nursing facility must not be eligible to receive the Minimum Payment Amounts for Eligibility Period Two.

(B) The nursing facility must be a Non-state Government-owned Nursing Facility with a Medicaid contract effective date of June 1, 2015, or earlier. HHSC will finalize its list of eligible facilities on June 1, 2015. A facility may only be eligible if its contract is assigned by DADS to a non-state government entity by May 31, 2015, with an effective date of June 1, 2015, or earlier.

(C) The nursing facility must have given DADS written notice of the change of ownership on or before February 1, 2015, but have not qualified for Eligibility Period Two because its contract was not assigned by DADS to a non-state government entity by February 28, 2015.

(D) DADS must have received all required documents pertaining to the change of ownership (i.e., DADS must have a complete application for a change of ownership license as described under 40 TAC §19.201(b) (relating to Criteria for Licensing)) by April 15, 2015.

(E) The Non-state Governmental Entity that owns the nursing facility must have entered into an IGT Responsibility agreement with HHSC by May 31, 2015. The IGT Responsibility agreement must cover the estimated IGT Responsibility for the nursing facility for the Eligibility Period.

(F) The Non-state Governmental Entity that owns the nursing facility must certify the following facts on a form prescribed by HHSC and the form must be received by HHSC by May 31, 2015:

(i) that it is a Non-state Government-owned Nursing Facility where a Non-state Governmental Entity holds the license and is party to the facility's Medicaid contract;

(ii) that all funds transferred to HHSC via IGT for use as the state share of payments are Public Funds; and

(iii) that no part of any payment made under the Minimum Payment Amount program under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds.

(G) The Non-state Governmental Entity that owns the nursing facility must submit to HHSC, upon demand, copies of any contracts it has with third parties that reference the administration of, or payments from, the Minimum Payment Amount program.

(5) Eligibility Period Three. A nursing facility is eligible to receive the Minimum Payment Amounts for Eligibility Period Three if it has met the following requirements:

(A) The nursing facility was eligible to receive the Minimum Payment Amounts for Eligibility Period Two or Eligibility Period Two-A.

(B) The Non-state Governmental Entity that owns the nursing facility must have submitted its estimated IGT responsibility for the entire eligibility period no later than a date determined by HHSC.

(C) The Non-state Governmental Entity that owns the nursing facility must certify the following facts on a form prescribed by HHSC and the form must be received by HHSC by a date determined by HHSC:

(i) that it is a Non-state Government-owned Nursing Facility where a Non-state Governmental Entity holds the license and is party to the facility's Medicaid contract;

(ii) that all funds transferred to HHSC via IGT for use as the state share of payments are Public Funds; and

(iii) that no part of any payment made under the Minimum Payment Amount program under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds.

(D) The Non-state Governmental Entity that owns the nursing facility must submit to HHSC, upon demand, copies of any contracts it has with third parties that reference the administration of, or payments from, the Minimum Payment Amount program.

(6) Geographic Proximity to Nursing Facility.

(A) For eligibility period one, any nursing facility with a CHOW Application approved by DADS with an effective date on or after October 1, 2014, must be located in the same Regional Healthcare Partnership (RHP) as the Non-state Governmental Entity taking ownership of the nursing facility.

(B) For eligibility periods two, two-A, and three, any nursing facility with a CHOW Application approved by DADS with an effective date on or after October 1, 2014, must be located in the same RHP as, or within 150 miles of, the Non-state Governmental Entity taking ownership of the nursing facility.

(f) Claims Filing Deadline. A Qualified Nursing Facility must file a Clean Claim for a Nursing Facility Unit Rate no later than 60 calendar days after the end of the Calculation Period within which the service is provided for the claim to qualify for the Minimum Payment Amount described in this section. The MCO must pay a Clean Claim that is filed after this deadline but within 365 calendar days of the date of service, at the standard rate established in the network provider agreement for Nursing Facility Unit Services; however, claims filed after the 60 deadline will not be incorporated in the calculation of the Minimum Payment Amount.

(g) IGT Responsibility.

(1) Timing. HHSC will determine IGT responsibilities prior to finalizing the managed care capitation rates that include the increase in payments to the MCOs due to the Minimum Payment Amounts program for the Eligibility Period.

(2) Aggregate IGT Responsibility. The aggregate IGT responsibility for all Qualified Nursing Facilities for an Eligibility Period will be equal to the non-federal share of the increase in the MCOs' capitation rates due to the Minimum Payment Amount program multiplied by the estimated number of member months for which the MCOs will receive the capitation rate during the eligibility period multiplied by 1.1.

(3) Allocation of Aggregate IGT Responsibility to Individual Nursing Facilities. HHSC will allocate the aggregate IGT responsibility to each qualified nursing facility based on the percentage of the total increase in the MCOs' capitation rates due to the Minimum Payment Amount program associated with the nursing facility in the base period data used to develop the capitation rates.

(4) Reconciliation. HHSC will complete the reconciliation in two parts.

(A) The first reconciliation will occur no later than 120 days after the end of the eligibility period.

(i) HHSC will compare the amount transferred by the Non-state Governmental Entity to HHSC for the eligibility period to the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity.

(ii) The calculation of the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity will be the same as the calculation of allocated aggregate IGT responsibility to all Qualified Nursing Facilities owned by the Non-state Governmental Entity as described in paragraphs (2) and (3) of this subsection with two exceptions:

(I) "Member months" will be revised to reflect actual known member months for the eligibility period. The revision will be conducted no sooner than the day after the last day of the eligibility period and no later than 120 days after the end of the eligibility period.

(II) The "Aggregate IGT Responsibility" described in paragraph (2) of this subsection will be equal to the non-federal share of the increase in the MCO's capitation rates due to the Minimum Payment Amount program multiplied by the revised member months. The calculation will not include the additional ten percent included in the calculation of the original aggregate IGT responsibility.

(III) No other changes will be made to the calculation of the allocated aggregate IGT responsibility and no other data points included in the calculation will be updated for purposes of this reconciliation.

(iii) If the amount transferred by the Non-state Governmental Entity exceeds the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity, HHSC will refund the excess amount to the Non-state Governmental Entity, less two percent of the amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity.

(iv) If the amount transferred by the Non-state Governmental Entity is less than the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity, HHSC will notify the Non-state Governmental Entity of the amount of the shortfall and of a deadline for the Non-state Governmental Entity to transfer the shortfall plus two percent of the amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity.

(B) For Eligibility Period Three only, HHSC may complete interim reconciliations between August 31, 2017, and August 31, 2019, as updated enrollment data for the Program Period, as reflected in adjusted member months, becomes available. HHSC will follow the process described in subparagraph (A) of this paragraph for such interim reconciliations.

(C) The second reconciliation will occur no later than 25 months after the end of the eligibility period.

(i) HHSC will compare the amount transferred by the Non-state Governmental Entity to HHSC for the eligibility period to the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity.

(ii) The calculation of the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity will be the same as the calculation of allocated aggregate IGT responsibility to all Qualified Nursing Facilities owned by the Non-state Governmental Entity as described in subparagraph (A) of this paragraph except that member months will be revised to reflect updated actual known member months for the eligibility period. The revision will be conducted sometime during the 25th month after the end of the eligibility period.

(iii) If the amount transferred by the Non-state Governmental Entity exceeds the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity, HHSC will refund the excess amount to the Non-state Governmental Entity.

(iv) If the amount transferred by the Non-state Governmental Entity is less than the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity, HHSC will notify the Non-state Governmental Entity of the amount of the shortfall and of a

deadline for the Non-state Governmental Entity to transfer the shortfall.

(D) If the Non-state Governmental Entity does not timely complete the transfer described in subparagraph (A), (B), or (C) of this paragraph, HHSC may:

(i) withhold any or all future Medicaid payments from the Non-state Governmental Entity until HHSC has recovered an amount equal to the shortfall; and

(ii) retain any funds that would normally be returned to the Non-state Governmental Entity as part of the reconciliation process.

(5) All IGT calculations are solely at the discretion of HHSC and are not open to desk review or appeal.

(h) Changes of Ownership. If a Qualified Nursing Facility changes ownership to another non-state government entity during either of the eligibility periods described in subsection (e) of this section, then the data used for the calculations described in subsection (d) of this section will include data from the facility for the entire Calculation Period, including data relating to payments for days of service provided under the prior owner.

(i) Recoupment.

(1) If payments under this section result in an overpayment to a nursing facility, or in the event of a disallowance by CMS of federal participation related to a nursing facility's receipt of or use of payment amounts authorized under subsection (d) of this section, the MCO(s) may recoup an amount equivalent to the amount of the second payment amount that was overpaid or disallowed.

(2) Second payment amount payments under this section may be subject to any adjustments for payments made in error, including, without limitation, adjustments made under the Texas Administrative Code, the Code of Federal Regulations and state and federal statutes. The MCO(s) may recoup an amount equivalent to any such adjustment from the nursing facility in question.

(3) If HHSC determines that part of any payment made under the Minimum Payment Amount program was used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds, the MCO(s) may recoup an amount equal to the second payment amount from the nursing facility in question.

(4) If HHSC determines that an ownership change to a Non-state Governmental Entity was based on fraudulent or misleading statements on a nursing facility CHOW application or during the CHOW process, the MCO(s) may recoup an amount equal to the second payment amount from the nursing facility in question for any eligibility period affected by the fraudulent or misleading statement.

(j) Dates the Minimum Payment Amount is available. The minimum payment requirements described in this section will only cover dates of service from the later of March 1, 2015, or the date on which nursing facility services become managed care services, to August 31, 2017.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 15, 2017.

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Proposal publication date: March 31, 2017
For further information, please call: (512) 707-6079

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TITLE 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 40. CHRONIC WASTING DISEASE

4 TAC §40.5

The Texas Animal Health Commission (commission) adopts amendments to §40.5, concerning Surveillance and Movement Requirements for Exotic CWD Susceptible Species, with changes to the proposed text as published in the December 30, 2016, issue of the *Texas Register* (41 TexReg 10495). In addition, a correction of error was published in the January 20, 2017, issue of the *Texas Register* (42 TexReg 255). The text of the rule will be republished.

The purpose of the amendments is to add surveillance, movement reporting, identification, and mortality recordkeeping requirements.

Chronic Wasting Disease (CWD) is a transmissible spongiform encephalopathy (TSE). CWD is a progressive, fatal, degenerative neurological disease of farmed and free-ranging deer, elk, and moose. TSEs include a number of different diseases affecting animals or humans including bovine spongiform encephalopathy (BSE) in cattle, scrapie in sheep and goats, and Creutzfeldt-Jacob disease (CJD) in humans. Although CWD shares certain features with other TSEs, it is a distinct disease affecting only deer, elk, and moose. The species known to be susceptible to CWD are North American elk or wapiti *(Cervus Canadensis),* red deer *(Cervus elaphus),* mule deer *(Odocoileus hemionus),* black-tailed deer *(Odocoileus hemionus),* white-tailed deer *(Odocoileus virginianus),* Sika deer *(Cervus Nippon),* and moose *(Alces alces).* The species that are found in Texas are white-tailed deer, mule deer, elk, red deer, and Sika deer.

The agent that causes CWD and other TSEs has not been completely characterized; however, the theory supported by most scientists is that TSE diseases are caused by proteins called prions. The exact mechanism of transmission is unclear; however, evidence suggests CWD is transmitted directly from one animal to another through saliva, feces, and urine containing abnormal prions shed in those body fluids and tissues. Because the disease has a long incubation period, animals infected with CWD may not produce any visible signs of the disease for a number of years after they become infected. The disease can be passed through contaminated environmental conditions and has been known to persist for a long period of time. The "official" diagnostic test for CWD is the Immunohistochemistry (IHC) test performed on the obex tissue of the brain and specific lymphoid tissues. This is a post-mortem test in which the animal must be dead to be tested. There is no known treatment or vaccine for CWD.

CWD was first recognized in 1967 in captive mule deer in Colorado. The disease has since been documented in captive

and/or free-ranging deer and elk in 24 states, including Texas, and 2 Canadian provinces.

In 2012, CWD was first discovered in Texas in a free-ranging mule deer in the Hueco Mountains along the New Mexico border in far West Texas. The commission and Texas Parks and Wildlife Department (TPWD) created a restricted zone that has required testing of susceptible species in that area and restricted movement of live animals. On June 30, 2015, a 2-year old white-tailed deer in a Medina County breeding facility was confirmed positive for CWD. Through testing requirements associated with tracing of deer either moved from or to this facility, CWD has also been discovered in other white-tailed deer, which includes four other facilities in Medina or Lavaca counties. A free-ranging mule deer buck, harvested in Hartley County, was confirmed positive for CWD on March 3, 2016. Hartley County is located in the Texas Panhandle and borders New Mexico. On December 6, 2016, a free-ranging elk was harvested in Dallam County. Dallam County is also located in the Texas Panhandle and borders New Mexico and Oklahoma.

The commission works in coordination and collaboration with the TPWD to address CWD issues and concerns and to assess and mitigate the risks to the Texas cervid industries. All mule deer, white-tailed deer, and native species are generally under the jurisdiction of TPWD. They are classified as property of the state of Texas and TPWD manages them as a valuable and important resource of the state. TPWD through specific statutory authorization does allow individuals to breed, trade, sell, move, release, and hunt white-tailed or mule deer that meet certain legal requirements.

Elk, Sika deer, and red deer are also classified as CWD susceptible species, but are not indigenous to the state and therefore, not subject to the jurisdiction of TPWD. They are classified as exotic livestock which are privately owned. Texas has an unknown number of exotic cervid species that are free-ranging or maintained on private property behind high fences. Many of these facilities are hunting ranches, which are not subject to the seasonal and regulatory hunting restrictions of TPWD.

Surveillance testing is a key, critical component to early detection of the disease and also the monitoring of the disease presence and prevalence in all areas of the state where CWD susceptible species exist. A strong surveillance system also supports Texas' animal industries and their marketability because it provides more assurance and confidence that these animals are healthy.

The United States Department of Agriculture (USDA) Animal Plant Health Inspection Service (APHIS) has federal standards requiring participation in a National CWD Herd Certification Program (HCP) which is designed to be a voluntary federal-state cooperative program implemented by participating states. The HCP's objective is to achieve a national approach that minimizes the risk of spreading CWD in cervid populations through uniform national herd certification standards. States must be approved by USDA to participate and these animals must be in an accepted program for the movement of these species interstate. Texas has an approved HCP program.

Though Texas' white-tailed deer population has had significant historical surveillance, very few elk, red deer or sika herds have participated in the CWD certification program. As such, the commission has limited CWD surveillance testing for these cervid species as a result of this program.

In 2009, legislation was passed that authorized the commission to establish a disease surveillance program for elk. This authority is found in §161.0541 of the Texas Agriculture Code. Under this statute, the commission may require each person who moves elk in this state to have elk participate in a disease surveillance program.

Pursuant to this legislation, the commission adopted rules that require elk to participate in a CWD surveillance program in 2010, however, the rules were held in abeyance until 2012 to encourage voluntary participation. Elk producers wishing to sell or move elk are required to either enroll in a CWD herd monitoring programs or have 20% of their mortalities tested to quality animals for movement. This program is found in Title 4, Texas Administrative Code, Chapter 40, §40.5. The commission received a total of 243 CWD tests results for elk and red deer from 2003 to September of 2016.

The detection of CWD in different locations in Texas creates a risk for CWD exposure or infection to other susceptible species throughout the state. The commission believes it is necessary to conduct enhanced surveillance of Exotic CWD Susceptible Species to protect against the spread of CWD. Without adequate and equitable testing throughout Texas, the risk only increases for spreading CWD in the state, This only poses a greater disease risk to the cervid industries, as well as creates greater opportunity for negative economic impact for those industries.

The commission has historically used a group of CWD stakeholders to provide guidance, along with recommendations to the commission staff regarding the CWD program and improving surveillance in the exotic CWD susceptible species. These stakeholders include members of USDA, TPWD, Texas Deer Association, Exotic Wildlife Association, Deer Breeder Corporation, Texas Wildlife Association, Texas Veterinary Medical Diagnostic Laboratory, Texas Southwest Cattle Feeders, Texas Veterinary Medical Association, AgriLife, along with noted private veterinary practitioners and wildlife biologists. The group discussed the need to modify the intrastate program for the Exotic CWD Susceptible Species to make it a more successful surveillance program.

The Exotic Wildlife Association submitted comments that indicated they were in support of the requirements as proposed and urged adoption. They stated that they wanted to ensure there is minimal risk for CWD in both farmed and wild cervid populations and believes the rules protect not only animal health but also does not stifle commerce within the industry.

The Texas Wildlife Association also submitted comments that indicated that they see the merit in simplicity and believes the proposed "first three" mortality testing requirement is sufficient for the majority of properties with these species in Texas. However, they believe the rules can and should go further when dealing with operations that create a higher risk profile for disease transmission (i.e. breeding facilities, large populations, prolific traders, etc.) and urged the commission to act with more urgency on implementing such rules as meaningful sample collections are pushed to the fall of 2017 when regular hunting season begins. They believe the commission should strive for as much surveillance as possible, as soon as possible.

The North American Elk Breeders Association submitted comments that they have thoroughly reviewed the proposal and recognize the program is being focused on ensuring minimal risk for CWD in farmed and wild animals. They agree that three CWD samples annually will produce more surveillance in the state and

the intrastate movement requirement mirrors examples of programs in other states.

Another commenter indicated that this requirement would be an unfair and burdensome to only the high fence property owners. In the Texas hill country large herds of exotics are located on low fence properties. It would be scientifically incorrect to have only high fence ranches that have just a few sika be subject to these requirements while the low fence neighbor with large number sika be exempt. If TAHC is going to implement these new requirements then it should be for everyone not just high fence ranches. This would help avoid any litigation concerning discriminatory practices toward high fence landowners. The commenter also proposed that all existing exotic CWD susceptible animals be exempt if the ranch is not selling live animals because it is impossible to know how many exotic animals are on ranches that are very large and have extremely thick brush, cedar and rugged terrain. This would put an undue burden on these ranches and could subject the land owner to violations not knowing what exotic animals that were naturally born or came onto the property via a hole in fence caused by hogs or downed trees. I however would support the testing of CWD susceptible animals that are being moved. Requiring a transfer document similar to that used for whitetail deer. The seller must have tested 20% or a set number of animals per year to maintain status. The broker/buyer must also be registered and commit to purchasing only animals from herds that have status.

The commission appreciates the comments, but believes that the commenter has misconstrued some of the requirements. The surveillance requirement applies to all locations (high fence or low fence) where there is a mortality of an exotic susceptible species. The purpose is to get greater test surveillance for this disease and is applied to all locations. The commenter also seems to believe the requirement should only be triggered by locations from which artificial movement occurs. The previous rule used that as the surveillance requirement and is being changed because they was not sufficient surveillance. The rule currently being considered now will no longer apply any test requirements to the movement, but does provide do movement documentation requirements so as to have greater traceability for any disease response.

The commission also received a comment regarding clarity in application of the requirements. The commenter indicated that "[t]he proposed wording is a bit muddled, ESPECIALLY since 40.5 has only dealt with LIVE TRANSPORT -- up until now. I feel strongly that a few simple changes or additions to proposed wording will GREATLY help in clearing up true INTENT for premise owners who might easily wonder (like me) what applies to them or not. For example, it's current wording stating *"the person controlling the CWD susceptible species..."* is absolutely NOT defined in 40.5 and they suggested the re-wording of Eligible Mortality and Surveillance Requirements. It was suggested that eligible mortality be clarified to indicate that it applies to any eligible animal on any and all premises which raise and/or contain any Exotic CWD Susceptible Species, whether a premise engages in live transport of these animals or not. Such deaths include hunter harvest or herd culling.

It was also suggested that Surveillance Requirements be clarified to apply whether live CWD-species transport movement is involved or not. The first three eligible mortalities of each calendar year shall be tested for CWD with three valid test results obtained. For example, depending on the premise's eligible mortality rates each year during a contiguous four year period, then there exists the potential for as little as zero up to a maximum of 12 total CWD successful tests required. The owner of the premises shall ensure that the CWD samples are properly collected and submitted in compliance with the collections requirements. The owner must report the test results to the commission within 30 days of receiving the test results.

The commission agrees that the suggested wording does provide greater clarity and makes those changes for the adopted version.

STATUTORY AUTHORITY

The amendments are adopted under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized, through §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock.

Pursuant to §161.005, entitled "Commission Written Instruments", the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice signed under that authority, has the same force and effect as if signed by the entire commission.

Pursuant to §161.006, entitled "Documents to Accompany Shipment", if required that a certificate or permit accompany animals or commodities moved in this state, the document must be in the possession of the person in charge of the animals or commodities, if the movement is made by any other means.

Pursuant to §161.0415, entitled "Disposal of Diseased or Exposed Livestock", the commission by order may require the slaughter of livestock, under the direction of the commission, or the sale of livestock for immediate slaughter.

Pursuant to §161.0417, entitled "Authorized Personnel for Disease Control", a person, including a veterinarian, must be authorized by the commission in order to engage in an activity that is part of a state or federal disease control or eradication program for animals. Section 161.0417 requires the commission to adopt necessary rules for the authorization of such persons and, after reasonable notice, to suspend or revoke a person's authorization if the commission determines that the person has substantially failed to comply with Chapter 161 or rules adopted under that chapter. Section 161.0417 does not affect the requirement for a license or an exemption under Chapter 801, Occupations Code, to practice veterinary medicine.

Pursuant to §161.046, entitled "Rules", the commission may adopt rules as necessary for the administration and enforcement of this chapter.

Pursuant to §161.048, entitled "Inspection of Shipment of Animals or Animal Products", the commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease.

Pursuant to §161.049, entitled "Dealer Records", the commission may require a livestock, exotic livestock, domestic fowl,

or exotic fowl dealer to maintain records of all livestock, exotic livestock, domestic fowl, or exotic fowl bought and sold by the dealer.

Pursuant to §161.054, entitled "Regulation of Movement of Animals", the commission, by rule, may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce.

Pursuant to §161.0541, entitled "Elk Disease Surveillance Program", the commission by rule may establish a disease surveillance program for elk.

Pursuant to §161.0545, entitled "Movement of Animal Products", the commission may adopt rules that require the certification of persons who transport or dispose of inedible animal products, including carcasses, body parts, and waste material. The commission by rule may provide terms and conditions for the issuance, renewal, and revocation of a certification under this section.

Pursuant to §161.055, entitled "Slaughter Plant Collection", the commission may require slaughter plants to collect and submit blood samples and other diagnostic specimens for testing for disease.

Pursuant to §161.056(a), entitled "Animal Identification Program", the commission, in order to provide for disease control and enhance the ability to trace disease-infected animals or animals that have been exposed to disease, may develop and implement an animal identification program that is no more stringent than a federal animal disease traceability or other federal animal identification program. Section 161.056(d) authorizes the commission to by a two-thirds vote adopt rules to provide for an animal identification program more stringent than a federal program only for control of a specific animal disease or for animal emergency management.

Pursuant to §161.057, entitled "Classification of Areas", the commission by rule may prescribe criteria for classifying areas in the state for disease control. The criteria must be based on sound epidemiological principles. The commission may prescribe different control measures and procedures for areas with different classifications.

Pursuant to §161.061, entitled "Establishment", if the commission determines that a disease listed in §161.041 of this code or an agency of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or that a place in this state or livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or an agency of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place.

Pursuant to §161.101, entitled 'Duty to Report", a veterinarian, a veterinary diagnostic laboratory, or a person having care, custody, or control of an animal shall report the existence of the diseases, if required by the commission, among livestock, exotic livestock, bison, domestic fowl, or exotic fowl to the commission within 24 hours after diagnosis of the disease.

§40.5. Surveillance and Movement Requirements for Exotic CWD Susceptible Species.

(a) Definitions:

(1) Eligible Mortality--The death from any cause of an Exotic CWD Susceptible Species that is 16 months of age or older on any and all premises which raise and/or contain any Exotic CWD Susceptible Species, whether a premises engages in live transport of these animals or not. This includes hunter harvest or herd culling on the premises, natural mortalities on the premises, or animals moved directly to slaughter.

(2) Exotic CWD Susceptible Species--A non-native cervid species determined to be susceptible to CWD, which means a species that has had a diagnosis of CWD confirmed by means of an official test conducted by a laboratory approved by USDA/APHIS. This includes North American elk or wapiti *(Cervus Canadensis),* red deer *(Cervus elaphus),* Sika deer *(Cervus Nippon),* moose *(Alces alces),* and any associated subspecies and hybrids. All mule deer, white-tailed deer, and other native species under the jurisdiction of the Texas Parks and Wildlife Department are excluded from this definition and application of this section.

(3) Premises--A physical location(s) which is contiguous, that is under common ownership or management, and represents a unique and describable geographic location.

(4) Transport--Movement of an Exotic CWD Susceptible Species from one non-contiguous property or premises to another.

(b) Surveillance Requirements. Each calendar year, the owner of a premises shall have all eligible mortalities CWD tested until such time that three animals are tested and valid test results are obtained. The owner of the premises shall ensure that the CWD samples are properly collected and submitted in compliance with the collections requirements. The owner must report the test results to the commission within 30 days of receiving the test results. This requirement applies to any premises where these species are located and is not dependent on the live movement of any of these species.

(c) Movement Reporting and Identification Requirements.

(1) Live Exotic CWD Susceptible Species moved or transported within the state shall be identified with an official identification device, which may include an eartag that conforms to the USDA alphanumeric national uniform ear tagging system (NUES), is a visible and legible animal identification number (AIN) or other identification methods approved by the commission, including a RFID device.

(2) In order to move live Exotic CWD Susceptible Species to or from a premises, the owner must obtain a Premises Identification Number (PIN). A PIN means a unique official seven character alphanumeric identification code issued under this chapter to identify a specific and unique premises.

(3) An owner of a premises where Exotic CWD Susceptible Species are located within a high fence shall keep herd records that include an annual inventory and mortality log for all Exotic CWD Susceptible Species. The inventory shall be submitted to the commission on or before April 1 of each year.

(4) A complete movement record for all live Exotic CWD Susceptible Species that are moved onto or off of a premises shall be submitted to the commission, either in hard or electronic copy on forms provided or authorized by the commission. The person moving the Exotic CWD Susceptible Species must have documentation with the Exotic CWD Susceptible Species being moved to show compliance with the requirements of this subsection. A copy of this documentation must be provided to any market selling these species. Such record shall be submitted within 48 hours of the movement. Movement reporting shall be directed to the commission by either writing to Texas Animal Health Commission, CWD Susceptible Species Reporting, P.O. Box 12966, Austin, Texas 78711-2966; or by fax to (512) 719-0729; or by email to CWD_reports@tahc.texas.gov.

(d) Testing Requirements. CWD test samples shall be collected and submitted to an official laboratory for CWD diagnosis using a USDA validated test for all eligible mortalities. Test reporting shall be directed to the appropriate commission region office. The samples may be collected by a state or federal animal health official, an accredited veterinarian, or a Certified CWD Postmortem Sample Collector. Tissue samples shall be the obex and a retropharyngeal lymph node from each animal tested eligible mortality.

(e) Test Result Reporting. The owner shall report all test results to the commission within 30 days of receiving the test results by either writing to Texas Animal Health Commission, CWD Susceptible Species Reporting, P.O. Box 12966, Austin, Texas 78711-2966; or by fax to (512) 719-0729; or by email to CWD_reports@tahc.texas.gov.

(f) Mortality Record Keeping.

(1) The owner of a premises where an Exotic CWD Susceptible Species eligible mortality occurs shall maintain the following mortality records:

(A) the date the Exotic CWD Susceptible Species dies or was harvested;

(B) the species, age, and sex of the animal;

(C) any RFID or NUES tag number affixed to the animal; and

(D) any other identification number, official or unofficial, on the animal.

(2) The mortality records shall be made available upon request to any commission employee acting in the performance of official duties.

(3) The mortality records shall be submitted to the commission on or before April 1 of each year either by writing to Texas Animal Health Commission, CWD Susceptible Species Reporting, P.O. Box 12966, Austin, Texas 78711-2966; or by fax to (512) 719-0729; or by email to CWD_reports@tahc.texas.gov.

(4) he mortality record shall be on a form provided or approved by the commission and shall be retained for a period of one year following submission to the commission.

(g) Inspection. In order to ensure compliance with these rules, a premises where Exotic CWD Susceptible Species are located may be inspected by the commission or authorized agents of the commission.

(h) Dealer Requirements. A dealer is a person engaged in the business of buying or selling Exotic CWD Susceptible Species in commerce on the person's own account, as an employee or agent of a vendor, purchaser, or both, or on a commission basis. To maintain separate herd status for the animals a dealer sells, a dealer shall maintain separate herd facilities and separate water sources; there shall be at least 30 feet between the perimeter fencing around separate herds; and no commingling of animals may occur. Movement of animals between herds must be recorded as if they were separately owned herds. A dealer shall maintain records for all Exotic CWD Susceptible Species transported within the state or where there is a transfer of ownership, and provide these to commission personnel upon request. Records required to be kept under the provisions of this section shall be maintained for not less than five years and shall include the following information:

(1) Owner's name;

(2) Location where the animal was sold or purchased;

(3) Official ID and/or Ranch tag (additional field for retag);

(4) Gender and age of animal;

(5) Source of animal (if purchased addition);

(6) Movement to other premises; and

(7) Disposition of the animal.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2017.

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Gene Snelson
General Counsel
Texas Animal Health Commission
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Proposal publication date: December 30, 2016
For further information, please call: (512) 719-0722

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CHAPTER 41. FEVER TICKS

4 TAC §41.8

The Texas Animal Health Commission (commission) adopts amendments to §41.8, concerning Dipping, Treatment, and Vaccination of Animals, with changes to the proposed text as published in the December 30, 2016, issue of the *Texas Register* (41 TexReg 10500). The text of the rule will be republished.

The purpose of the amendments to §41.8 is to provide the Designated Fever Tick Epidemiologist, with the approval of the Executive Director, the discretion to approve inspections, dipping, treatments and/or vaccination requirements that are less stringent than those currently prescribed, taking into consideration the circumstances of the affected producer, and the commission's overarching goal to encourage producers to maintain cattle on affected premises. With routine inspections and treatment, cattle maintained on or near premises have significant value to the Cattle Fever Tick Eradication Program (CFTEP) by serving as sentinel animals, and if found, control agents of the fever tick.

The purpose of the CFTEP is to eradicate fever ticks through the management of a permanent quarantine zone, as well as through temporary quarantine areas, created to address the presence of ticks outside the permanent zone.

Texas Southwestern Cattle Raisers Association (TSCRA) provided comments which indicated that cattle fever ticks pose a significant cattle health threat to the United States and could have detrimental effects on the cattle market and trade if not controlled. These factors make the ability of the commission to effectively eradicate cattle fever ticks from the U.S. of utmost importance to our industry. TSCRA strongly supports the efforts of the commission in their surveillance, control, testing, and treatment of any livestock and/or wildlife that may serve as a host for cattle fever ticks, while recognizing the importance of cattle production in all quarantine zones. TSCRA strongly supports the commission's proposed amendment to §41.8 of the Texas Administrative Code.

Texas Cattle Feeders also has the same concerns for the threat that fever ticks pose the cattle industry and strongly supports the purpose of the amendment to provide the DFTE, with the approval of the Executive Director, the discretion in addressing these problems.

STATUTORY AUTHORITY

The amendments are adopted under the following statutory authority as found in Chapters 161 and 167 of the Texas Agriculture Code. The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized, through §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock.

Pursuant to §161.005, entitled "Commission Written Instruments", the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice signed under that authority, has the same force and effect as if signed by the entire commission.

Pursuant to §161.007, entitled "Exposure or Infection Considered Continuing", if a veterinarian employed by the commission determines that a communicable disease exists among livestock, domestic animals, or domestic fowl or on certain premises or that livestock, domestic animals, or domestic fowl have been exposed to the agency of transmission of a communicable disease, the exposure or infection is considered to continue until the commission determines that the exposure or infection has been eradicated through methods prescribed by rule of the commission.

Pursuant to §161.048, entitled "Inspection of Shipment of Animals or Animal Products", the commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease.

Pursuant to §161.054, entitled "Regulation of Movement of Animals", the commission, by rule, may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce.

Pursuant to §161.057, entitled "Classification of Areas", the commission by rule may prescribe criteria for classifying areas in the state for disease control. The criteria must be based on sound epidemiological principles. The commission may prescribe different control measures and procedures for areas with different classifications.

Pursuant to §161.061, entitled "Establishment", if the commission determines that a disease listed in §161.041 of this code or an agency of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or that a place in this state or livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or an agency of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place.

Pursuant to §161.081, entitled "Importation of Animals", the commission by rule may regulate the movement, including movement by a railroad company or other common carrier, of livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl into this state from another state, territory, or country.

Pursuant to §167.003, entitled "General Powers and Duties of the Commission", the commission shall eradicate all ticks capable of carrying Babesia in this state and shall protect all land, premises, and livestock in this state from those ticks and exposure to those ticks. In carrying out this chapter, the commission may adopt necessary rule.

Pursuant to §167.004, entitled "Classification of Animals or Premises as Infested, Exposed or Free from Exposure", the commission by rule shall define what animals and premises are to be classified as exposed to ticks. The commission shall classify as exposed to ticks livestock that have been on land or in an enclosure that the commission determines to be tick infested or exposed to ticks or to have been tick infested or exposed to ticks before or after the removal of the livestock, unless the commission determines that the infestation or exposure occurred after the livestock were removed and that the livestock did not become infested or exposed before removal.

§41.8. Dipping, Treatment, and Vaccination of Animals.

Unless otherwise determined by the DFTE and approved by the Executive Director, the following requirements shall apply:

(1) General Requirements:

(A) All scratch inspections, dipping, treatment, and vaccination prescribed in this section must be done under the supervision of a representative authorized by the commission.

(B) All scratch inspections, dipping, treatment, or vaccination must be done under instructions issued by the commission. All requirements will be in written form directed to the owner or caretaker. An inspector for the commission will deliver the instructions in person along with a copy of these regulations. All premises boundaries will be listed in the instructions.

(C) The owner or caretaker of livestock on infested and exposed premises must comply with the TAHC approved Quarantine Schedule as follows:

(i) The starting date for infested premises for Table I (Pasture Treatment or Vacation Schedule, South of Highway 90) and Table II (Pasture Treatment or Vacation Schedule, North of Highway 90), is the date of the first clean dipping of 100% of the livestock.

(ii) The starting date for exposed premises for Table I and Table II is when 100% of the livestock on the premises have been dipped.

(iii) Copies of Table I (Pasture Treatment or Vacation Schedule, South of Highway 90) and Table II (Pasture Treatment or Vacation Schedule, North of Highway 90) may be obtained from the Texas Animal Health Commission, P.O. Box 12966, Austin, Texas 78711-2966.

Figure: 4 TAC §41.8(1)(C)(iii)

(D) The owner or caretakers must gather and present all livestock for scratch inspection, dipping, treatment or vaccination required by the commission. The owner or caretaker is responsible for all costs associated with and labor necessary for presenting the owner or caretaker's cattle for scratch inspection, dipping, treatment, or vaccination at the location prescribed by the commission.

(2) Requirements for Dipping, Treatment, or Vaccination:

(A) Dipping Requirements:

(i) The owner or caretaker of livestock on infested or exposed premises must present the livestock to be scratch inspected and dipped with subsequent dipping every seven to 14 days until the

livestock are moved from the premises in accordance with these regulations, except as provided in subsection (1)(C) of this section.

(ii) The 14-day interval may be extended due to circumstances beyond the control of the owner upon approval by an authorized representative of the commission. In no event will the extension be more than three days. If the extension is granted, no certificate for movement will be issued after the 14th day, and the next dip must be on the original 14-day schedule.

(iii) The scratch inspection and first dip must be within 14 days from the date infestation or exposure is discovered unless otherwise approved by the commission.

(iv) A dip is not official unless 100% of the livestock within the premises affected are dipped on schedule.

(v) The commission will authorize for use in dipping only those dips that have been approved by the Animal and Plant Health Inspection Service of the United States Department of Agriculture and the commission for use in official dipping to rid animals of the tick.

(vi) The concentration of the dipping chemical used must be maintained in the percentage specified for official use by means of the approved vat management techniques established for the use of the agent; or, if applicable, by an officially approved vat side test or field test of the commission.

(vii) If the commission requires livestock to be dipped, the livestock shall be submerged in a vat. A spray-dip machine may be used in areas where a vat is not reasonably available.

(viii) Careful hand spraying may be used for easily restrained horses and show cattle, and when specifically authorized by a commission representative, certain zoo or domestic animals.

(ix) Livestock unable to go through a dipping vat because of size or physical condition, as determined by a commission representative, may be hand sprayed.

(x) The dip treatment must be paint marked on the animals so that it can be identified for as treated for at least 17 days after the treatment.

(B) Authorized Treatment Requirements:

(i) Following the first clean dipping of 100% of the livestock, the cattle may be treated with injectable doramectin in lieu of systematic dipping. The owner or caretaker of cattle on an infested or exposed premises must present the livestock to be scratch inspected and treated with injectable doramectin every 25-28 days until the livestock are moved from the premises in accordance with these regulations, except as provided in subsection (1)(C) of this section.

(ii) Treatment of doramectin shall by administered by subcutaneous injection by a representative of the commission.

(iii) The owner or caretaker must comply with the slaughter withholding period (35 days) of doramectin by holding cattle at the premises of origin until the withdrawal period is completed.

(iv) Treatment is not official unless 100% of the livestock within the premises affected are treated on schedule.

(v) Free-ranging wildlife or exotic livestock that are found on infested or exposed premises, and which are capable of hosting fever ticks will be treated by methods approved by the commission and for the length of time specified by the commission.

(I) Ivermectin medicated corn may be administered to free-ranging wildlife or exotic livestock by a representative of the commission following the close of the hunting season, provided that treatment is terminated at least 60 days prior to the beginning of the next hunting season to comply with the required withdrawal period.

(II) Permethrin impregnated roller devices may be used for topical treatment of free-ranging wildlife or exotic livestock during periods when ivermectin medicated corn is not administered. The commission may specify the use of other pesticides for treatment of wildlife or exotic livestock when deemed necessary to control and eradicate fever ticks.

(C) Vaccination Requirements:

(i) The fever tick vaccine shall be administered by employees or authorized agents of the USDA/APHIS/Veterinary Services or the commission.

(ii) The owner or caretaker must comply with the 60 day slaughter withholding period, or other slaughter withholding timeframe as specified by the label. The owner or caretaker must hold vaccinated cattle at the premises of origin until the withdrawal period is completed.

(iii) In addition to any dipping or treatment required by this section, beef cattle two months of age or older located within the tick eradication quarantine area shall be vaccinated with the fever tick vaccine at intervals prescribed by the commission. The vaccine must be administered when cattle are gathered and presented for annual inspection as required by §41.9 of this chapter (relating to Vacation and Inspection of a Premise) and at other times specified by the commission.

(iv) In addition to any dipping or treatment required by this section, the commission may require fever tick vaccination of beef cattle two months of age and older located within the temporary preventative quarantine area, control purpose quarantine area or other beef cattle or premises epidemiologically determined by the commission to be at an increased risk for fever ticks. The cattle shall be vaccinated at intervals prescribed by the commission.

(3) Herd Plan and Protest. Each premises within a tick eradication quarantine area, temporary preventative quarantine area, or control purpose quarantine area will be classified by the commission as an infested, exposed, adjacent, or check premises and is required to execute a herd management plan and remain under restrictions until no evidence of fever ticks is disclosed or a complete epidemiologic investigation fails to disclose evidence of exposure to fever ticks, with the concurrence of the DFTE. A person may protest an initial test or a herd plan for each premises classified as increased risk for fever ticks.

(A) To protest, the responsible person must request a meeting, in writing, with the Executive Director of the commission within 15 days of receipt of the herd plan or notice of an initial test and set forth a short, plain statement of the issues that shall be the subject of the protest, after which:

(i) the meeting will be set by the Executive Director no later than 21 days from receipt of the request for a meeting;

(ii) the meeting or meetings shall be held in Austin; and

(iii) the Executive Director shall render his decision in writing within 14 days from date of the meeting.

(B) Upon receipt of a decision or order by the executive director which the herd owner wishes to appeal, the herd owner may file an appeal within 15 days in writing with the Chairman of the commission and set forth a short, plain statement of the issues that shall be the subject of the appeal.

(C) The subsequent hearing will be conducted pursuant to the provisions of the Administrative Procedure and Texas Register Act, and Chapter 32 of this title (relating to Hearing and Appeal Procedures).

(D) If the Executive Director determines, based on epidemiological principles, that immediate action is necessary, the Executive Director may shorten the time limits to not less than five days. The herd owner must be provided with written notice of any time limits so shortened.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2017.

TRD-201701933
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: May 30, 2017
Proposal publication date: December 30, 2016
For further information, please call: (512) 719-0722

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CHAPTER 59. GENERAL PRACTICES AND PROCEDURES

4 TAC §59.9, §59.13

The Texas Animal Health Commission (commission) adopts an amendment to §59.9, concerning Historically Underutilized Business Program, and new §59.13, concerning Posting of Certain Contracts; Enhanced Contract Monitoring, with changes to the proposed text of §59.9 as published in the December 30, 2016, issue of the *Texas Register* (41 TexReg 10503). The text of §59.9 will be republished.

The new rule implements procedures for contracts for the purchase of goods or services from private vendors.

The purpose of the amendment to §59.9 is to reference the correct rules relating to the Historically Underutilized Business Program. The new rule is adopted in response to Texas Government Code §2261.253 enacted by the 84th Texas Legislature, which requires each state agency by rule to establish a procedure to identify contracts that require enhanced contract or performance monitoring and prescribes certain reporting requirements.

No comments were received regarding the proposal.

STATUTORY AUTHORITY

The new rule is adopted under Texas Government Code §2261.253, which requires the commission to adopt and enforce rules to implement procedures for contracts for the purchase of goods or services from private vendors and establish a procedure to identify each contract that requires enhanced contract or performance monitoring and submit information on the contract to the agency's governing body.

Pursuant to §2161.003 of the Texas Government Code, a state agency shall adopt the Comptroller's rules under §2161.002 as the agency's own rules. Those rules apply to the agency's construction projects and purchases of goods and services paid for with appropriated money without regard to whether a project or purchase is otherwise subject to this subtitle.

§59.9. Historically Underutilized Business Program.

The Texas Animal Health Commission adopts by reference the rules of the Texas Comptroller of Public Accounts in 34 TAC Part 1, Chapter 20, Subchapter B (relating to Historically Underutilized Business Program).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Gene Snelson
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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 100. CHARTERS

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING OPEN-ENROLLMENT CHARTER SCHOOLS

DIVISION 1. GENERAL PROVISIONS

19 TAC §100.1010

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 19 TAC §100.1010(b) is not included in the print version of the Texas Register. The figure is available in the on-line version of the May 26, 2017, issue of the Texas Register.)

The Texas Education Agency (TEA) adopts an amendment to §100.1010, concerning open-enrollment charter schools. The amendment is adopted with changes to the proposed text as published in the November 25, 2016, issue of the *Texas Register* (41 TexReg 9219). The amendment adopts in rule the *2016 Charter School Performance Framework Manual* established under Texas Education Code (TEC), §12.1181.

REASONED JUSTIFICATION. TEC, §12.1181, requires the commissioner to develop and adopt rules for performance frameworks that establish standards by which to measure the performance of open-enrollment charter schools. The frameworks are used to annually evaluate each open-enrollment charter school. However, the performance of a school on a performance framework may not be considered for purposes of renewal of a charter under TEC, §12.1141(d), or revocation of a charter under TEC, §12.115(c).

In accordance with statute, the TEA developed the Charter School Performance Framework (CSPF) Manual. The manual includes measures for charters registered under the standard system and measures for charters registered under the alternative education accountability system as adopted under 19 TAC §97.1001, Accountability Rating System. The commissioner

exercised rulemaking authority to adopt 19 TAC §100.1010 effective September 18, 2014.

The performance frameworks evolve from year to year, so the criteria and standards for measuring open-enrollment charter schools in the most current year may differ to some degree over those applied in the prior year. The intention is to update 19 TAC §100.1010 annually to refer to the most recently published CSPF Manual.

The amendment adopts in rule the *2016 Charter School Performance Framework Manual,* which will be used to assign performance levels on the 2016 CSPF Report.

A technical change was made at adoption to the *2016 Charter School Performance Framework Manual,* Operational Framework Indicator 3f, Training Requirements, to align language regarding how charter governing body members and school officers obtain their positions by changing the phrase "hired or appointed" to "appointed or hired."

SUMMARY OF COMMENTS AND AGENCY RESPONSES. The public comment period on the proposal began November 25, 2016, and ended December 27, 2016. Following is a summary of public comments received and corresponding agency responses.

Comment: The Texas Charter Schools Association (TCSA) stated there is a lack of clarity for how the performance frameworks will be used in discretionary renewal and revocation decisions under TEC, §12.1141(c) and §12.115(a)(5).

Agency Response: The comment is outside the scope of the current rule proposal. Section 100.1010 is concerned with the creation of performance frameworks and a description of criteria used for general oversight of charter school performance using the CSPF Manual.

Comment: The TCSA commented that the CSPF Manual's Operational Framework Indicator 3f improperly requires board members and school officers to have completed annually required charter board training by December 1, 2016, while 19 TAC §100.1102(b) and §100.1103(b) mandate that such training be completed within one calendar year of appointment or election.

Agency Response: The agency disagrees and provides the following clarification. The December 1, 2016, date in Operational Framework 3f is intended to establish greater timeline specificity for the authorizer. In addition, the compliance section on the Annual Governance Reporting Form asks individuals whether they have completed the annually required training and allows them the opportunity to provide an explanation if they have not yet completed the training by the December 1 submission date of the form. Therefore, the "Does Not Meet Expectations" box in Operational Framework Indicator 3f is not necessarily triggered by a "no" response on the Annual Governance Reporting Form.

Comment: TCSA commented that Operational Framework Indicators 3b, Program Requirements - Special Populations; 3c, Program Requirements - Bilingual Education/English as a Second Language Populations; and 3d, Program Requirements - Career and Technical Education Populations, should be moved from the Operational Framework Indicators to the Academic Framework Indicators.

Agency Response: The agency disagrees. Operational Framework Indicators 3b, 3c, and 3d are concerned with a charter school's overall maintenance of the programs, not with actual student achievement.

Comment: TCSA commented that the agency should reexamine the Financial Framework Indicator titles "Material Weaknesses in Internal Controls," "Default on Debt," and "Material Noncompliance" and the Operational Framework Indicator title "Criminal Record Employment Requirements." TCSA commented that these indicator titles, as represented on the report generated from application of the CSPF Manual, do not fully convey the purpose of the indicators and could cause confusion or alarm.

Agency Response: The agency disagrees. The names of the Financial and Operational Framework Indicators are necessarily condensed for presentation on the CSPF Report but have been designed to be as descriptive as possible. Furthermore, ratings for these indicators, such as a green checkmark and a red x, are sufficient for informing the public that a charter school's performance is or is not meeting the minimum criteria. In addition, the Financial Framework Indicators are aligned to the Financial Integrity Rating System of Texas for Charter Schools (Charter FIRST) indicators.

Comment: TCSA commented that it encouraged the agency to provide further explanation on the performance frameworks to ensure the public receives all necessary information to properly interpret the CSPF Report.

Agency Response: The agency agrees that public access to the CSPF Manual and Report is essential to ensure informed choice with regard to public schools in Texas. These documents will be available to the public from sources including the agency's website.

Comment: TCSA commented that Operational Framework Indicator 3a, Teacher Qualifications, may suggest a school is not hiring teachers with a baccalaureate degree simply because the school currently has a long-term substitute supporting a teacher on medical or family leave.

Agency Response: The agency provides the following clarification. 1) TEC, §12.129, and 19 TAC §100.1015(b)(3)(F)(ii) mandate that all teachers must have a baccalaureate degree. Charter schools may refer to their own local policies for qualifications of short-term substitutes and long-term substitutes. 2) Although Texas law allows charter schools flexibility with regard to educator qualifications, TEC, §12.130, requires that a charter school provide written notice of the qualifications of each teacher employed by the school. 3) The data source collected in the Texas Student Data System Public Education Information Management System (TSDS PEIMS) requires charter schools to report the teacher of record. Charter schools are expected to be compliant with each of these minimum requirements.

Comment: The University of Texas Charter School System, University of Houston Charter School, The University of Texas at Tyler Ingenuity Center, and UTPB STEM Academy commented that because charter schools operated by a public senior college or university are unique, those charter schools should be evaluated on a distinct set of performance measures. The commenters included a specific rule text recommendation that would add a new subsection (c) to address the applicability of performance measures to a charter school of a public senior college or university. The commenters also specifically noted that Indicators 5-10 of Charter FIRST are inaccurate measures of their schools' performances.

Agency Response: The agency agrees that charter schools operated by public senior colleges or universities are different from typical open-enrollment charter schools. Although the commenters' recommended new subsection (c) would provide for measures that are consistent with accountability standards for public senior colleges or universities, it is currently unclear what those standards are. For this reason, the agency disagrees with inclusion of the recommended new subsection (c) until the suggested language may be deemed consistent with general performance frameworks described by the authorizing statute.

Additionally, the commenters' reference to Indicators 5-10 of Charter FIRST is irrelevant because these indicators are outside the scope of the current rule proposal. None of the Charter FIRST indicators cited in the comment are sources of data used for the 2016 Performance Frameworks' financial indicators. The data sources for the 2016 Performance Frameworks' financial indicators are as follows.

The data source for Financial Framework Indicator 2a, Timely Submission of Annual Financial Report, is Charter FIRST Indicator 1.

The data source for Financial Framework Indicator 2b, Administrative Cost Ratio, is Charter FIRST Indicator 11.

The data source for Financial Framework Indicator 2c, Unmodified Opinions, is Charter FIRST Indicator 2A.

The data source for Financial Framework Indicator 2d, Material Weaknesses in Internal Controls, is Charter FIRST Indicator 2B.

The data source for Financial Framework Indicator 2e, Default on Debt, is Charter FIRST Indicator 3.

The data source for Financial Framework Indicator 2f, Total Variance, is Charter FIRST Indicator 13.

The data source for Financial Framework Indicator 2g, Material Noncompliance, is Charter FIRST Indicator 14.

STATUTORY AUTHORITY.

The amendment is adopted under the Texas Education Code, §12.1181, which requires the commissioner to develop and by rule adopt performance frameworks that establish standards by which to measure the performance of an open-enrollment charter school.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, §12.1181.

§100.1010. Performance Frameworks.

(a) The performance of an open-enrollment charter school will be measured annually against a set of criteria set forth in the Charter School Performance Framework (CSPF) Manual established under Texas Education Code, §12.1181. The CSPF Manual will include measures for charters registered under the standard system and measures for charters registered under the alternative education accountability system as adopted under §97.1001 of this title (relating to Accountability Rating System).

(b) The assignment of performance levels for open-enrollment charter schools on the 2016 CSPF report is based on specific criteria, which are described in the 2016 Charter School Performance Framework Manual provided in this subsection.
Figure: 19 TAC §100.1010(b)

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 9, 2017.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 336. RADIOACTIVE SUBSTANCE RULES

SUBCHAPTER B. RADIOACTIVE SUBSTANCE FEES

30 TAC §336.103

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §336.103.

The amendment to §336.103 is adopted without change to the proposed text as published in the February 3, 2017, issue of the *Texas Register* (42 TexReg 409), and therefore will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

Section 336.103(c) requires a holder of a license for a low-level radioactive waste disposal site issued under Chapter 336, Subchapter H, to pay an annual license fee for the services received from TCEQ. The rulemaking would remove the word "quarterly" to allow flexibility for the Radioactive Materials Division and the Financial Administration Division to invoice cost recoverable activities by TCEQ on an as-needed basis.

Section Discussion

The commission adopts the amendment to §336.103(c) to remove the word "quarterly" where the rule requires the executive director to invoice for the amount of recoverable cost activities incurred on a quarterly basis.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of the rule amendment to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is to reduce the reporting of cost recovery activities from quarterly to annually relating to permitting activities, simply because these activities have been reduced since the operations and license of the low-level radioactive disposal facility license was issued and license amendments are less frequent.

Further, the rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The cost of complying with the adopted amendment is not expected to be significant with respect to the economy as a whole or a sector of the economy; therefore, the adopted rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

Furthermore, the adopted rulemaking does not meet the statutory definition of a "major environmental rule" because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). This section only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The adopted rulemaking does not meet the four applicability requirements, because the adopted amendment: 1) does not exceed a standard set by federal law; 2) does not exceed an express requirement of state law; 3) does not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program as no such federal delegation agreement exists with regard to the adopted rule; and 4) is not an adoption of a rule solely under the general powers of the commission.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated this adopted rulemaking and performed an assessment of whether the adopted rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission adopted this rulemaking for the specific purpose of conforming the language of a rule to the current state of licensing activities and the necessity for cost recovery since the low-level radioactive waste disposal facility commenced operations and license amendments have become less frequent.

A "taking" under Texas Government Code, Chapter 2007 means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%. Because no taking of private real property would occur by altering the schedule of reporting cost recovery to an annual reporting from a quarterly reporting schedule, the commission has determined that promulgation and enforcement of this adopted rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rule because the adopted rulemaking neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the rulemaking. Therefore, the adopted rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Public Comment

The commission offered a public hearing on February 27, 2017. The comment period closed on March 6, 2017. No comments were received.

Statutory Authority

The amendment is adopted under the Texas Radiation Control Act, Texas Health and Safety Code (THSC), Chapter 401; THSC, §401.011, which provides the commission authority to regulate and license the disposal of radioactive substances; and THSC, §401.245, which requires the commission, by rule, to adopt and periodically revise party state compact waste disposal fees. The adopted amendment is also authorized by Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The adopted amendment revises the language to create reduced reporting of cost recovery of license amendment activities from quarterly to annually in order to conform to the current state of licensing activities since the low-level radioactive waste disposal facility commenced operations and license amendments have become less frequent.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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